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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL FLORES, Defendant and Appellant.	G045067 (Super. Ct. No. 99NF1214) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Manuel Flores to be a mentally disordered offender (MDO). He argues on appeal the court erred in admitting hospital records over his objection, in instructing the jury, and the prosecutor committed misconduct during argument. We affirm.

I

FACTS

In 1999, Flores pled guilty to felony battery on a peace officer (Pen. Code, § 243, subd. (c); all statutory references are to this code unless otherwise stated), and three misdemeanors: resisting arrest (§ 148, subd. (a)), falsely representing himself to a peace officer (§ 148.9, subd. (a)), and failing to register as sex offender (former § 290, subd. (a)(2) [repealed by Stats. by 2007, ch. 579, § 7, p. 3738]). He admitted he inflicted great bodily injury (§ 12022.7, subdivision (a)) during the battery and had served a prior term in state prison. (§ 667.5, subd. (b).) The court sentenced defendant to 16 months in state prison. Flores was subsequently transferred to Atascadero State Hospital for involuntary treatment as a condition of parole and his status was changed from prisoner to MDO pursuant to section 2962. His commitment to the state hospital system has been extended a number of times since then. On October 6, 2010, the district attorney again filed a petition to extend Flores's commitment pursuant to section 2970.

Jody Ward has a Ph.D. in clinical psychology and is a clinical and forensic psychologist. She was appointed to evaluate Flores at the prosecutor's request. She reviewed Flores's chart at the hospital and interviewed him over the years on at least four occasions.

In 1999, Flores was apparently living in an abandoned lot. A fire was started on the lot and a police officer responded. Flores threw a bottle of beer at the officer, striking him on the head. Flores then threw rocks at the officer and eventually there was a struggle on the ground. At one point, Flores is reported to have grabbed for

the officer's firearm. When read his *Miranda*[1] rights, Flores began "speaking in tongues." Ward said Flores's paranoia played a substantial part in his actions during the commitment offense. His conduct was unprovoked. He was responding to internal stimuli and not the officer's action. It is the response to internal stimuli that makes the mentally ill individual dangerous to others.

When Ward interviewed Flores about the incident, he said he threw the bottle, but the officer's head crashed into, or moved and hit the bottle. Another time he said he never threw a bottle at the officer. According to Ward, Flores does not "see reality for what it is." She said he currently suffers from a severe mental disorder — schizophrenia, undifferentiated type — and represents a substantial danger of physical harm to others. He has olfactory hallucinations, has exhibited delusions, and has negative symptoms associated with schizophrenia, including the fact that he is socially withdrawn and does not manifest much speech. Ward said Flores would be dangerous if in an unmedicated condition and, if Flores were to be released from the hospital at the present time, he would not take his prescribed medications.

In opining Flores's mental disorder was not in remission, Ward referred to and relied on a number of staff entries in Flores's chart from 2005 through 2010, as well as records she already had on Flores from her past evaluations of him. She said Flores's mental illness and delusions actively led him to engage in violence against others while at the hospital. Records indicate in 2005 Flores argued with another patient because he thought the patient smelled bad. The incident escalated and Flores had to be physically restrained after he pulled a shank (a three-inch piece of sharpened metal) out of his pocket. Contraband that could be used as weapons was found in his locker. He hid other dangerous items inside his mattress. He also placed a reinforced nail into the sole of one of his shoes.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

Another 2005 note in Flores's chart indicates he began spitting a lot. He spit on walls, floors, in bottles. "He just was spitting everywhere." That behavior continues. Records indicate that when staff have attempted to have him stop, he has become aggressive toward them. A 2005 record also documented an incident where Flores was observed exiting the female staff's restroom and when confronted, he called a staff member a bitch. His threats to kill staff members have been documented on more than one occasion.

Also in 2005, there was an incident where staff smelled something burning in Flores's bedroom and, in searching the room, found under his bed paper towels rolled into a wick and burned. Flores admitted having lit something on fire but said he did it in the courtyard.

Ward said notes in Flores's file indicated he was noncompliant in taking his prescribed psychotropic medication. He refused his medications and was "pocketing" medication rather than swallowing it. He also engaged in what is called "cheeking" his medications; a process whereby the pills are tucked inside the cheek instead of being swallowed. A note in Flores's chart indicated that after repeatedly refusing his medications in September 2005, Flores became aggressive with another patient. "[W]ithin seconds, that verbal aggression escalated into fisticuffs."

Ward said Flores's symptoms are not controlled by treatment and he "is so sick, [it is] difficult for him to benefit from treatment." She noted Flores has been aggressive and violent even while he is being treated in the hospital.

The records in Flores's chart were prepared by his psychiatrist, psychologist, technicians and nurses. Hospital staff recorded in the chart their observations of Flores. The documents in the chart are required by law and must be created at or near the time of the events described therein. Such records are created by the hospital in the regular course of its business.

Dr. Krishna Murthy, is a staff psychiatrist at Patton State Hospital and is the head of Flores's treatment team. He sees Flores at least once a week. The team also includes a psychologist, social workers and psychiatric technicians. Murthy said the hospital maintains voluminous records in the patients' charts. He identified nine exhibits as entries from Flores's chart and said the hospital is required to create and maintain them. The records are to be created at or near the time of the described event and are prepared by members of the treatment team.

Murthy said Flores has no understanding of his mental illness and has said he does not need medication. According to Murthy, Flores has a severe mental disorder that substantially impairs his perception of reality, emotional process or judgment, or which grossly impairs his behavior. Flores's chronic schizophrenia affects his perception of reality, making accurate perception difficult. He hears voices, has olfactory hallucinations, and has had delusions. His symptoms have not been controlled by medication. In October 2010, Flores suffered a psychotic episode when he was extremely paranoid and suspicious. During this episode, Flores said he did not know how to breathe. He also attempted to hit a staff member.

Murthy said Flores exhibits one of the more severe examples of schizophrenia. His condition is chronic and possibly lifelong. He will need medication the rest of his life. Still, medications have not been successful in controlling his symptoms. Murthy concluded Flores would be dangerous to others if he stopped taking his medication, because he is capable of violence of the type engaged in the offense that resulted in his commitment and other incidents he was involved in at the hospital. Murthy also opined Flores would not take his medications if he were to be released from the hospital.

II

DISCUSSION

A. *Hospital Records*

Ten entries in Flores's hospital chart from Patton State Hospital were admitted into evidence at trial. One exhibit documented the psychotic break Flores suffered in October 2010, when he refused to return to his unit and stated he did not know how to breathe. When a staff member attempted to inject Flores with Zyprexa which Flores had agreed to receive "after long counseling," Flores swung around and attempted to hit the staff member. The remaining entries documented events in 2005, including times when (1) without provocation, Flores was verbally aggressive with a patient and the incident quickly escalated into a fight; (2) Flores hallucinated; (3) Flores was physically and verbally abusive with staff, and threatened to kill a staff member; (4) staff smelled something burning in Flores's room and found under his bed paper towels rolled into a wick and burned at the end; (5) Flores had been in the female staff's restroom and was verbally abusive when confronted upon exiting the restroom; and (6) Flores attempted to assault a staff member with what could be described as a shank, a three-inch sharpened piece of metal.

A writing that records an act or event is not made inadmissible by the hearsay rule if "(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.) A trial court has wide discretion to determine whether a sufficient foundation was laid to qualify a document as a business record, and we will not reverse the trial court's ruling absent an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.) To demonstrate an abuse of

discretion, the defendant must show "'no reasonable basis'" for admitting the evidence. (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.)

Dr. Murthy is Flores's psychiatrist at the hospital, and a member of his treatment team. He testified the exhibits are part of Flores's chart from the hospital. He said the chart is required by law to be created and maintained by the hospital, entries must be made at or near the time of the incidents described therein, team members make the entries and the entries are to be as accurate as possible. The court admitted the exhibits into evidence as business records of the hospital.

On appeal, Flores argues the trial court erred in admitting the entries from his medical chart. He contends admission of the records denied him due process of law, because the records were not reliable and he was not afforded the opportunity to cross-examine the individuals whose statements are recorded in the records. His arguments lack merit.

The trial court admitted the records into evidence as business records. (Evid. Code, § 1271.) Flores's trial counsel conceded the records qualified as business records, but objected to their admission, contending the documents were "incomplete business records" and "were taken out of context." Counsel urged the court to exclude the records as misleading and violative of Flores's due process rights. Counsel did not object to the admission of the records on the grounds that the records were unreliable and he was not afforded the opportunity to cross-examine the individuals whose statements are contained therein. Thus, those issues have not been preserved for appeal. (*People v. Crittenden* (1994) 9 Cal.4th 83, 126.)

The argument fails in any event. The trial court, recognizing that merely because a record may qualify as a business record under the Evidence Code does not mean the record is reliable, specifically found the records in this matter were reliable. "It is well established that, as a general rule, 'hospital records are business records and as such are admissible if properly authenticated.' [Citation.]" (*People v. Diaz* (1992) 3

Cal.4th 495, 535.) A hospital record "is a record upon which treatment of the patient is based, and experience has shown it to be reliable and trustworthy. [Citation.] It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event.' [Citations.]" (*Fuller v. White* (1948) 33 Cal.2d 236, 242.) We cannot conclude the trial court abused its discretion in finding the records reliable and admitting the records into evidence.

It is important to note we are not presented with evidence admitted in a criminal prosecution, wherein a defendant has a Sixth Amendment right of confrontation. The confrontation clause of the Sixth Amendment prevails over a state's rules of evidence insofar as testimonial hearsay is concerned. (*Crawford v. Washington* (2004) 541 U.S. 36, 51.) In a noncriminal matter, any right of confrontation is brought to bear not by the Sixth Amendment, but by the due process clause of the Fourteenth Amendment. (*People v. Otto* (2001) 26 Cal.4th 200, 214.) A key difference between testimonial hearsay considered under the Sixth Amendment and the same evidence considered under a due process analysis is that while such evidence is inadmissible under the Sixth Amendment in a criminal prosecution regardless of the reliability of the evidence (*Crawford v. Washington, supra,* 541 U.S. at pp. 61-64), reliable testimonial hearsay admitted pursuant to the Evidence Code is not categorically inadmissible under due process. (*People v. Angulo* (2005) 129 Cal.App.4th 1349, 1367-1368.)

Needless to say, an individual facing an involuntary civil commitment is entitled to due process. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80; *People v. Otto, supra,* 26 Cal.4th at p. 209.) However, the risk of an erroneous deprivation of an alleged MDO's compelling interest in remaining free from an involuntary civil commitment posed by admission of evidence pursuant to Evidence Code section 1271 is not substantial. (See *People v. Castillo* (2010) 49 Cal.4th 145, 165-166.) The hearing provided Flores was fundamentally fair, the touchstone of due process. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790.) In addition to meeting the Evidence Code section

1271's requirements for admission as business records, the court found the documents reliable. Flores was able to cross-examine the experts who relied on the records in forming their opinions, had access to discovery procedures — civil and criminal (§ 2972, subd. (a)) [2] — and was free to subpoena as witnesses and examine those individuals who prepared the records.[3] Nothing prevented Flores from presenting his "'side of the story before a responsible government official[.]'" (*In re Parker* (1998) 60 Cal.App.4th 1453, 1462-1463.)

The court found the records more probative than prejudicial. This finding is supported by the evidence. Although one entry in Flores's medical chart from October 2010, showed a psychotic break and an act of violence, the remaining entries were from 2005. Taken together, they demonstrate Flores's mental illness existed years ago and continues to the present. Even if the records were considered testimonial and the Sixth Amendment confrontation clause would render them inadmissible in a criminal prosecution, admission of reliable hospital records in this civil commitment proceeding did not violate due process. Accordingly, we reject Flores's challenge to the admission of the records into evidence.

B. *Jury Instructions*

1. *Standard of Review*

Flores contends the trial court erred in denying two of his proposed jury instructions and instructing the jury pursuant to CALCRIM No. 3457. We independently review whether a proposed jury instruction correctly states the law. (*People v. Posey*

[2] As the civil discovery act applies to MDO proceedings (§ 2972, subd. (a)), Flores could have taken the depositions of the individuals who made the entries into his hospital chart. (*People v. Angulo* (2005) 129 Cal.App.4th 1349.)

[3] The fact that entries in Flores's medical chart are written in the third person does not mean the facts set forth therein were not observed by the staff members who made the entries.

(2004) 32 Cal.4th 193, 218.) An error in instructing the jury generally requires reversal "'only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. [Citations.]' [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1267.) However, where the failure to instruct resulted in a denial of due process, the matter must be reversed absent proof beyond a reasonable doubt the error was harmless. (See *People v. Elliot* (2005) 37 Cal.4th 453, 475, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

2. *Right to Refuse Medication*

Flores proposed and the court refused the following instruction: "A Mentally Disordered Offender has a right to refuse the involuntary administration of antipsychotic medication." The court denied the instruction because it concluded a patient's right to refuse medication was not relevant to the issues to be decided by the jury and the instruction would have confused the jury.

An individual has a federal and a state constitutional right to refuse antipsychotic medication. "[A]n individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.'" (*Sell v. United States* (2003) 539 U.S. 166, 178, quoting *Washington v. Harper* (1990) 494 U.S. 210, 221.) The right is protected by the Fourteenth Amendment (*Sell v. United States*, *supra*, 539 U.S. at p. 178) and by the California Constitution and common law. (*In re Qawi* (2004) 32 Cal.4th 1, 14.) This liberty interest is so fundamental it can only be overcome by an "an 'essential' or 'overriding' state interest[.]" (*Sell v. United States*, *supra*, 539 U.S. at pp. 178-179, quoting *Riggins v. Nevada* (1992) 504 U.S. 127, 134.) Indeed, this right is so fundamental an adult with capacity has the right to refuse medical "'treatment necessary to sustain life.'" (*In re Qawi*, *supra*, 32 Cal.4th at p. 14.)

The mere fact an individual has been determined to be an MDO does not alter the individual's right to refuse antipsychotic medication. (*In re Qawi*, 32 Cal.4th at p. 10.) An order requiring an MDO to take antipsychotic medication in a nonemergency

situation is permissible only if a court "makes one of two findings: (1) that the MDO is incompetent or incapable of making decisions about his medical treatment; *or* (2) that the MDO is dangerous within the meaning of Welfare and Institutions Code section 5300." (*In re Qawi, supra*, 32 Cal.4th at pp. 9-10.) Conversely, just because an individual is neither incompetent nor incapable of making medical decisions and fails to mean to meet Welfare and Institutions Code section 5300's definition of dangerousness does not mean the person cannot qualify as an MDO.

Even assuming Flores retained his right to refuse antipsychotic medication, the court did not err in refusing his proposed instruction. The right to refuse antipsychotic medication was not relevant to the issues at trial. The questions to be decided by the jury were: (1) whether Flores has a severe mental disorder; (2) whether the severe mental disorder was in remission, or cannot be kept in remission without continued treatment; and (3) whether, because of Flores's severe mental disorder, he presently represents a substantial danger of physical harm to others. (§§ 2970, 2972.) Flores's right to refuse antipsychotic medication was only remotely related to the issue of whether his severe mental disorder was in remission or cannot be kept in remission without continued treatment. Dr. Murthy testified Flores's mental disorder, schizophrenia, is so severe it can only be controlled by antipsychotic medication. The doctor concluded defendant may need to take antipsychotic medication for the remainder of his life and that if he stopped taking the medication he would be dangerous to others. Indeed, Murthy testified that even with defendant taking the prescribed antipsychotic medication, his mental illness is not in remission.

Flores's refusal to take antipsychotic medication demonstrates he would likely become actively psychotic if released because he lacks the control to continue taking the medications, thus rendering him a substantial danger to cause physical harm to others. When an MDO's mental illness and the danger he poses to others can only be controlled by medication, whether the individual is likely to take his or her medication if

released is of utmost importance. An individual who refuses the necessary medication poses the same danger to the public, whether the refusal is within his rights or not. An individual's right to refuse antipsychotic medication does not include the right to be released from a civil commitment despite the danger he or she poses to others due to a severe mental disorder requiring treatment by antipsychotic medication.

Moreover, to the extent there was testimony Flores had refused to take medications for medical issues other than his severe mental illness, any failure to instruct the jury on Flores's right to refuse such treatment would have been harmless. The issue was whether Flores followed the treatment plan for his severe mental disorder, not whether he failed on occasion to take medication for pain, diabetes, or an infection.

Additionally, any failure to instruct would have been harmless because Flores's severe mental disorder was not in remission. He continued to demonstrate the symptoms of his illness even while taking medication in a controlled setting. Thus, in his present *medicated* condition he continued to pose a substantial danger of physical harm.

3. *Presumption Instruction*

The court also refused the following instruction: "A Mentally Disordered Offender has a right to the presumption that he is not a Mentally Disordered Offender." As worded the proposed instruction is incomprehensible and was properly refused. (*Bullock v. Phillip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 684-685 [court may refuse instruction incomprehensible to average juror and has no duty to modify the instruction].) Absent a sua sponte duty to instruct the jury with a presumption-of-innocence-like instruction, the court did not err in rejecting Flores's incomprehensible instruction.

Flores cited *People v. Beeson* (2002) 99 Cal.App.4th 1393, in the trial court as authority for the instruction. His reliance was misplaced. The appellate court in *People v. Beeson* found an alleged MDO is *not* entitled to an instruction to the effect he is presumed not to qualify as an MDO. (*Id.* at p. 1404.)

Flores argues *Beeson* conflicts with controlling Supreme Court precedent, but cites no opinion from the United States Supreme Court holding a jury must be instructed in a civil commitment proceeding that the individual is presumed not to qualify for the civil commitment, and we have found none. In *Conservatorship of Roulet* (1979) 23 Cal.3d 219, our Supreme Court held a proposed conservatee has a constitutional right to a proof beyond a reasonable doubt standard based on United States Supreme Court precedent and its own decisions. (*Id*. at pp. 229-230.) However, two months after the decision in *Conservatorship of Roulet*, the high court held due process does *not* mandate proof beyond a reasonable doubt in civil commitment proceedings. (*Addington v. Texas* (1979) 441 U.S. 418, 432-433 [clear and convincing evidence sufficient for civil commitment under 14th Amendment due process clause].) *Taylor v. Kentucky* (1978) 436 U.S. 478, is inapt as it is a criminal case.

While the federal Constitution does not require proof beyond a reasonable doubt in civil commitment proceedings, California does. (§ 2972, subd. (a); *Conservatorship of Roulet*, *supra* 23 Cal.3d at p. 231 [conservatorship proceeding]; *People v. Burnick* (1975) 14 Cal.3d 306, 332 [mentally disordered sex offender proceeding].) Thus, the question becomes whether a presumption-of-innocence-like instruction is constitutionally compelled whenever proof beyond a reasonable doubt is the standard of proof. We find it is not.

Even in a criminal case, the failure to instruct on the presumption of innocence does not necessarily constitute error, much less prejudicial error. "[T]he failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor* [*v. Kentucky*, supra, 436 U.S. 478], such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial." (*Kentucky v. Whorton* (1979) 441 U.S. 786, 789.) "To be

sure, we have said that '[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of *criminal* justice.' [Citation.] The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt. [Citation.] But even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense. [Citation.] An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a '"genuine danger"' that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt. [Citations.]" (*Delo v. Lashley* (1993) 507 U.S. 272, 278, italics added.) As Flores is not charged with a crime, there was no chance of a conviction.

If the failure to give a presumption of innocence instruction in a criminal case is not necessarily error, much less reversible error (*Kentucky v. Whorton*, *supra*, 441 U.S. at p. 789), it cannot be maintained a trial court has a sua sponte duty under the federal Constitution to provide a presumption-of-innocence-like instruction in a civil commitment case. And Flores does not cite any case holding such an instruction is required under the California Constitution. In rejecting the same argument in *People v. Beeson*, *supra*, 99 Cal.App.4th 1393, Division Two of this court observed, "The term 'presumption of innocence' alone indicates that it applies exclusively in the criminal context . . . ." (*Id.* at p. 1409.)

The case most favorable to Flores's position is *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082. There, our brethren in Division One did not decide whether a court has a sua sponte duty to give a presumption-of-innocence-like instruction in a civil commitment proceeding, but held "that, *on request*, a court is required to instruct in language emphasizing a proposed conservatee is presumed to not be gravely disabled until the state carries its burden of proof." (*Id.* at p. 1099, italics added.) *Walker* does not aid Flores. If the court does not have a sua sponte duty to instruct on a certain

principle, the court did not err in refusing to give the proposed incomprehensible instruction. (*Bullock v. Phillip Morris USA, Inc.*, *supra*, 159 Cal.App.4th at pp. 684-685.)

And even were we to assume the trial court had a sua sponte duty to give a presumption-of-innocence-like instruction in an MDO proceeding, "[t]he only effect of the presumption is to insure that the state proves its case beyond a reasonable doubt. The jury here was fully instructed as to the effect of the presumption and could not have been prejudiced by the failure to denominate the presumption." (*Conservatorship of Walker*, *supra*, 196 Cal.App.3d at p. 1099.) The jury was expressly instructed "[t]he fact that a petition has been filed is *not* evidence that the petition is true" (*italics added*) and the fact that a petition has been filed against the respondent must not bias the jury against Flores. The jury was also clearly instructed it could not return a true finding absent proof beyond a reasonable doubt and its determination was to be based solely on the evidence presented at the trial. Because the jury was so instructed, there is no reason to believe the jury relieved the prosecution of its burden of proof.

Therefore, any error in failing to give a presumption-of-innocence-like instruction was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Given the fact the United States Supreme Court has held the due process clause does not require the proof beyond a reasonable doubt standard in a civil commitment proceeding (*Addington v. Texas*, *supra*, 441 U.S. at p. 432), the *Chapman* (*Chapman v. California*, *supra*, at p. 386 U.S. at p. 24) standard of review does not apply.

4. *CALCRIM No. 3457*

The jury was instructed pursuant to CALCRIM No. 3457, in pertinent part, as follows: "The petition alleges that the respondent is a mentally disordered offender. [¶] To prove this allegation, the People must prove beyond a reasonable doubt that; [¶] . . . [¶] [1.] He has a severe mental disorder; [¶] 2. The severe mental disorder is not in remission or cannot be kept in remission without continued treatment; [¶] AND [¶] 3.

Because of his severe mental disorder, he presently represents a substantial danger of physical harm to others. [¶] A severe mental disorder is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. It does not include a personality disorder, or epilepsy, or mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances.

"Remission means that the external signs and symptoms of the severe mental disorder are controlled by either psychotic medication or psychosocial support. [¶] A severe mental disorder cannot be kept in remission without treatment if, during the period of the year prior to March 1st, 2011 the person: [¶] 1. Was physically violent except in self-defense; or [¶] 2. Did not voluntarily follow the treatment plan. [¶] A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.

"A substantial danger of physical harm does not require proof of a recent overt act."

Flores claims the instruction failed to correctly state the law because it did not convey to the jury that he could only be recommitted if the state proved he has "'serious difficulty in controlling [his dangerous] behavior.'" He argues the instruction is defective in failing to make clear he could be recommitted only if his mental illness results in a "volitional impairment," making him dangerous. (See *Kansas v. Crane* (2002) 534 U.S. 407, 413.)

If the instruction was constitutionally defective, Flores's failure to object to the instruction would be of no moment. "A trial court has a sua sponte duty to 'instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case' . . . ." (*People v. Blacksher* (2011) 52 Cal.4th 769, 845-846.)

Flores's argument was considered and rejected in *People v. Putnum* (2004) 115 Cal.App.4th 575. In *Putnum*, the jury was instructed in substantially the same language used in the present case. (*Id*. at p. 579.) The court found a jury instructed in the language of the statute to the effect that one alleged to qualify as an MDO must be proven beyond a reasonable doubt to have a severe mental disorder and "that '*by reason* of such severe mental disorder, [appellant] represents a *substantial* danger [of] physical harm to others'" the jury could not have found Putnum to be an MDO without having found beyond a reasonable doubt his "substantially impaired capacity" caused him to pose a substantial danger of physical harm to others. (*Id*. at p. 582.)

We agree. There is no need to establish an individual, due to a mental disorder, completely lacks volitional control. It is sufficient if the mental disorder makes volitional control difficult. (*Kansas v. Crane, supra,* 534 U.S. at p. 411.) A severe mental disorder that substantially impairs a person's thought, perception of reality, emotional process, or judgment and *causes* the person to pose a substantial danger of physical harm to others suffices. As the high court noted in *Kansas v. Crane*, """"The line between an irresistible impulse and an impulse not resisted is probably no sharper that that between twilight and dusk."""" (*Id*. at p. 412) As the instruction did not permit the jury to find Flores to be an MDO unless it found beyond a reasonable doubt his severe mental disorder caused him to pose a substantial danger of physical harm to others, the instruction meets the substantive due process requirement for a civil commitment. (See *Id*. at p. 409.) No other instruction on the issue is constitutionally compelled.

Like the *Putnum* court we do not decide whether a special instruction specifically addressing the issue of volitional control should be given if requested. There was no such request in this case.

5. *Cumulative Instructional Error*

Flores argues the cumulative effect of the various alleged instructional errors requires reversal. As we found the court did not err in instructing the jury, there

was no prejudice to cumulate.

C. *Mistrial based on Prosecutorial Misconduct*

During argument, the prosecutor told the jury, "As you know, Mr. Flores was committed to mandatory, involuntary and supervised mental health treatment under . . . the [MDO] law. The question in this trial is whether his commitment should be extended for further treatment for another year." Flores's counsel immediately moved for a mistrial based on the prosecutor's telling the jury any commitment would only be for one year. The court did not grant a mistrial, but instructed the jury as follows: "You have heard a statement that the commitment extension is for one year. The court will instruct you that you are not to consider that the extension is for one year. You are to only decide if there is to be an extension of the commitment based on all the law that I read to you. The length of the extension is not to be considered by you for any reason, and it must not enter into your deliberations in any way." The court then inquired of the jurors if anyone could not follow the instruction. No juror stated an inability to comply with the admonishment.

"A mistrial motion must be granted only when the risk of prejudice is incurable by admonition or instruction. [Citation.]" (*People v. Elliot* (2012) 53 Cal.4th 535, 583.) We review the trial court's denial of defendant's mistrial motion under the deferential abuse of discretion standard. (*Ibid*.)

The court did not abuse its discretion in denying the motion for a mistrial. Even if alerting the jury to the fact that a recommitment would be for a one-year term may be considered the equivalent of informing the jury of the possible penalty faced by a criminal defendant (see *People v. Holt* (1984) 37 Cal.3d 436, 458 ["possible punishment is not a proper matter for jury consideration"]), the court's admonishment here cured the defect (*People v. Thomas* (2011) 51 Cal.4th 449, 487), and we presume the jury followed the court's instruction. (*People v. Stevens* (2007) 41 Cal.4th 182, 205-206.) That

presumption is especially appropriate here, where immediately after admonishing the jury the court inquired of the jurors whether anyone would be unable follow the admonishment and no juror voiced a concern. We see no reason to conclude the jury ignored or was otherwise unable to comply with the court's admonishment. Without addressing whether the alleged instance of prosecutorial misconduct was actually misconduct, we conclude the court's curative instruction rendered it harmless under any standard.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.